

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK JOSEPH ANSTEY,

Defendant-Appellant.

UNPUBLISHED

February 8, 2005

No. 255416

Berrien Circuit Court

LC No. 03-411091-SD

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

In this interlocutory appeal, the prosecution appeals by leave granted from orders dismissing alternate charges against defendant Mark Joseph Anstey of operating a motor vehicle while under the influence of intoxicating liquor, or operating a motor vehicle with an unlawful bodily alcohol level, second offense, MCL 257.625(1)(a) or (b), and MCL 257.625(8)(b). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was arrested for OUIL and was transported to the Berrien County jail for chemical testing. The arresting officer refused defendant's request to be taken to a medical facility in South Bend, Indiana for an independent chemical test. Defendant then asked to be taken to a local hospital, which was a ten- or fifteen-minute drive from the jail. The arresting officer again refused, offering instead to take defendant to a closer facility. Defendant rejected that offer and never received an independent blood-alcohol test.

The district court upheld the arresting officer's denial of defendant's request to be taken to Indiana, as the request was unreasonable. The district court concluded that defendant's second choice of facility was reasonable and should have been honored. The district court ordered the suppression of the Breathalyzer test results originally obtained by the police. The circuit court disagreed and remanded with instructions to dismiss. The sole issue before this Court concerns the proper remedy for a denial of defendant's statutory right to an independent blood-alcohol test conducted by someone of his choosing.

MCL 257.625a(6)(d) provides that "[a] person who takes a chemical test administered at a peace officer's request . . . shall be given a reasonable opportunity to have a person of his or her own choosing administer 1 of the chemical tests" The purpose of this legislation is "to protect the motorist by ensuring that scientific evidence is not gathered by, and at the sole disposal of, only one party" *People v Green*, 260 Mich App 392, 407; 677 NW2d 363

(2004). Where the police administer a chemical test to a suspect, but wholly fail to allow the suspect to obtain his or her own independent chemical test, dismissal of the attendant charges is the appropriate remedy. *Id.*; *People v Hurn*, 205 Mich App 618, 620; 518 NW2d 502 (1994); *People v Willis*, 180 Mich App 31, 37; 446 NW2d 562 (1989); *People v Underwood*, 153 Mich App 598, 600; 396 NW2d 443 (1986).

The prosecution urges this Court to apply *People v Dicks*, 190 Mich App 694; 476 NW2d 500 (1991), to the current case. In *Dicks*, the police administered a chemical test to the defendant and refused the defendant's reasonable request to be taken to a certain location for an independent test. The police did take the defendant to another facility for the independent test and the defendant did not challenge the results. This Court found that the remedy for the failure to cooperate more fully with the defendant's wishes was suppression of the police-administered test results, not dismissal of the charges. See *id.* at 700-701. The holding of *Dicks* is expressly limited to its own facts, and this Court otherwise acknowledged that dismissal remains appropriate "where a defendant is denied the right to have an independent chemical test." *Id.* at 701.

We do not agree with the prosecution that *Dicks* should control in this case. MCL 257.625a(6)(d) places in the defendant's hands not only the decision whether to have a second test, but who, within reason, should perform it. In this case, the police conducted their chemical test, but failed to accommodate defendant's reasonable request for transportation to a facility of his choosing for an independent test. As a result, defendant did not receive the requested independent test. Defendant was not required to accept transportation to an independent facility of the officer's choice; he had the right to select a facility within reason. As defendant did not receive an independent chemical test by a reasonable medical facility of his choice, or any other facility, *Dicks* is inapposite to this case. Accordingly, we find that the circuit court properly ordered the dismissal of the charges against defendant.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper